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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

TIFFANY INO, individually, and on behalf of  
other members of the general public similarly  
situated;

Plaintiff,

v.

THE GAP, INC., a Delaware corporation; and  
DOES 1 through 10, inclusive

Defendants.

Case No. CV14-00292 CW

**DEFENDANT THE GAP, INC.'S  
NOTICE OF MOTION AND MOTION  
TO DISMISS PLAINTIFF'S FIRST  
AMENDED COMPLAINT OR STAY  
THE PROCEEDINGS, MOTION FOR A  
MORE DEFINITE STATEMENT, AND  
MOTION TO STRIKE;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Date: May 29, 2014  
Time: 2:00 p.m.  
Courtroom: 2  
Judge: Hon. Claudia Wilken

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**NOTICE OF MOTION AND MOTION**

TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA AND TO PLAINTIFF TIFFANY INO AND HER COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 29, 2014 at 2 p.m., or as soon thereafter as the matter may be heard, before the Honorable Claudia Wilken, United States District Court, Northern District of California, Defendant The Gap, Inc. will and hereby does move for an order dismissing Plaintiff's First Amended Complaint ("FAC") pursuant to Federal Rule of Civil Procedure 12(b)(6), or, in the alternative for a more definite statement under Rule 12(e). Should the Court not dismiss Plaintiff's FAC entirely, Gap moves for an order dismissing or staying all of Plaintiff's claims on behalf of herself and California-based collective action members pursuant to *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) and/or the Court's inherent authority to avoid duplicative litigation. *See Crawford v. Griffin Bell*, 599 F.2d 890 (9th Cir. 1979). Alternatively, Gap requests that the Court stay Plaintiff's bag check-related claims pending the U.S. Supreme Court's decision in *Integrity Staffing Solutions v. Busk*. *See Landis v. North American Co.*, 299 U.S. 248 (1934). Lastly, Gap moves for an order striking the improperly pled DOE defendants from Plaintiff's FAC pursuant to Rule 12(f).

Plaintiff's FAC fails to meet the pleading standard established by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Specifically, the FAC is comprised of formulaic recitations of legal allegations and conclusory assertions of liability, but is devoid of the facts required to show an entitlement to relief. Should the Court not dismiss the FAC entirely, the Court should dismiss or stay all of Plaintiff's claims on behalf of herself and collective action members in California pursuant to *Colorado River* or the Court's inherent authority to avoid duplicative litigation. Gap is currently defending against Plaintiff and her counsel in two other pending cases that assert the identical issues on behalf of California employees in state court. Alternatively, Gap requests that the Court stay Plaintiff's bag check-related claims pending the U.S. Supreme Court's decision in *Integrity Staffing Solutions v. Busk*, as the outcome of that case will directly impact Plaintiff's



1 claims. Lastly, Gap requests that the Court strike allegations regarding DOE defendants as  
 2 improper because there is no provision in the FRCP permitting the use of fictitious defendants.

3 This motion is based upon this Notice of Motion and Motion, the Memorandum of Points  
 4 and Authorities in support thereof, the Declaration of Jessica Perry in support thereof, any reply  
 5 brief filed in support of this motion, the papers on file in this action, oral argument at the hearing,  
 6 and any other matters that the Court may properly consider.

### 7 **MEMORANDUM OF POINTS AND AUTHORITIES**

#### 8 **I. INTRODUCTION AND STATEMENT OF ISSUES TO BE DECIDED**

9 Plaintiff's FAC suffers from multiple defects that compel its dismissal or a stay of this  
 10 action. Although this is Plaintiff's second opportunity to plead adequate allegations, she once  
 11 again fails to plead sufficient facts to state a cause of action under Rule 12(b)(6). Plaintiff's new  
 12 allegations are entirely speculative, extremely broad, and fail to support her claims.

13 Rather than pleading facts demonstrating that Gap violated Sections 206 and 207 of the  
 14 Fair Labor Standards Act, she simply added "examples of Defendants' policies and practices"  
 15 that supposedly deprived Plaintiff and the potential class of overtime and minimum wages, like  
 16 the purported policy that Gap "requir[es] Plaintiff and the Nationwide Collective Class members  
 17 to perform several tasks prior to clocking in, such as locating and opening secured lockers,  
 18 putting away their personal belongings, putting on their name badges, locating, testing, sanitizing,  
 19 and putting on a walkie talkie, and obtaining fitting room keys." FAC ¶¶ 21(b), 22(b). She does  
 20 not, however, allege that these purported "policies and practices" actually applied to her (or the  
 21 collective action members), that she followed any of the policies or practices, or that she actually  
 22 performed any of these activities. Without any facts that these purported policies actually  
 23 resulted in unpaid overtime and minimum wages, Plaintiff's FAC fails to meet the requirements  
 24 of *Iqbal* and *Twombly* and state a plausible claim for relief. Furthermore, any time spent on the  
 25 activities Plaintiff alleges to support her FAC is not compensable time under the FLSA and  
 26 therefore it cannot form the basis for Plaintiff's unpaid overtime and minimum wage claims.

27 Thus, the FAC must be dismissed for failure to state a plausible claim for relief. Alternatively,

1 the Court should require that Plaintiff provide a more definite statement because her FAC is so  
2 vague that Gap is unable to reasonably frame a responsive pleading.

3 Should the Court not dismiss the FAC entirely for failure to state a claim, the Court  
4 should dismiss or stay all of Plaintiff's claims on behalf of herself and collective action members  
5 in California pursuant to *Colorado River* or the Court's inherent authority to avoid duplicative  
6 litigation. Gap is currently defending against Plaintiff and her counsel in two other pending cases  
7 that assert the identical issues on behalf of California employees in state court. Plaintiff cannot  
8 litigate the same issues in two forums simultaneously. Alternatively, Gap requests that the Court  
9 stay Plaintiff's bag check-related claims pending the United State Supreme Court's decision in  
10 *Integrity Staffing Solutions v. Busk*, as the outcome of that case will directly impact Plaintiff's  
11 claims. Lastly, Gap requests that the Court strike the improperly pled DOE defendants.

## 12 II. STATEMENT OF RELEVANT FACTS

### 13 A. The Parallel, First Filed Harmon and Collins State Court Actions.

14 On April 24, 2012, Plaintiff Harmon filed a class action complaint against The Gap, Inc.  
15 (the "*Harmon* Action") entitled *Anthonaya Harmon v. The Gap, Inc.*, Case No. RIC1206120.  
16 The *Harmon* Action is pending in Riverside County Superior Court. See Declaration of Jessica  
17 Perry in support of Defendant's Motion to Dismiss ("Perry Decl.") ¶ 2, Exh. A.

18 Over a year after the *Harmon* Action was filed and extensively litigated, on July 15, 2013,  
19 Plaintiff Collins filed a nearly identical class action complaint against The Gap, Inc. (the "*Collins*  
20 Action") entitled *Erin Collins v. The Gap, Inc.*, Case No. CGC-13-532831. The *Collins* Action is  
21 pending in San Francisco County Superior Court. See Perry Decl. ¶ 3, Exh. B. Counsel for  
22 plaintiff in the Collins Action, Shenkman and Hughes, is also counsel for Plaintiff Ino here. Id.

23 The *Harmon* and *Collins* Actions involve nearly identical claims (failure to pay all wages  
24 due, overtime wages, and minimum wage; failure to provide meal periods and to authorize and  
25 permit rest breaks; failure to provide timely or accurate final paychecks; failure to keep proper  
26 records; failure to provide accurate wage statements; failure to reimburse business expenses; and  
27 engaging in unfair business practices) on behalf of the same parties (all current and former

1 hourly-paid or non-exempt individuals employed by The Gap, Inc. in its Gap retail stores within  
 2 California) against the same defendant (The Gap, Inc.).<sup>1</sup> *Id.* at Exhs. A-B. After Harmon filed  
 3 her complaint, she engaged in extensive discovery and investigation. *Id.* at ¶ 5. The parties  
 4 exchanged information relating to Gap's policies and practices, as well as information relating to  
 5 the composition of the class. *Id.* Plaintiff took the depositions of three person most qualified  
 6 witnesses on 35 topics, and Gap deposed Harmon. *Id.* Gap also provided Plaintiff with a 15%  
 7 sampling of putative class members' time records and payroll records, and both parties retained  
 8 economists to analyze the sampling of time records and payroll records. *Id.*

9 On August 30, 2013, after well over a year of litigating the case and extensive written  
 10 discovery and depositions, Harmon filed her Motion for Class Certification. *Id.* at ¶ 6. Shortly  
 11 after Gap filed its opposition and before Harmon filed her reply, the parties in the *Harmon* Action  
 12 agreed to mediate the case and filed a joint stipulation to continue the class certification briefing  
 13 schedule and hearing while the parties discussed a classwide settlement. *Id.* The parties then  
 14 mediated the *Harmon* Action before experienced mediator Mark. S. Rudy, Esq., and with the  
 15 assistance of Mr. Rudy, the parties reached a full and final resolution on December 16, 2013. *Id.*  
 16 The parties entered into a Stipulation and Settlement Agreement of Class Action Claims on or  
 17 about February 24, 2014 (the "*Harmon* Settlement"). The Court granted Preliminary Approval to  
 18 the *Harmon* Settlement on March 24, 2014. Perry Decl. ¶ 7, Exhs. D, E.

19 Pursuant to the terms of the *Harmon* Settlement, the *Harmon* class agreed to release and  
 20 forever discharge The Gap, Inc. from:

21 all claims, demands, rights, liabilities, and causes of action that were or could have been  
 22 asserted (whether in tort, contract, or otherwise) for violation of local, state, and federal  
 23 law arising out of, or relating to, the facts and allegations pled in the First Amended  
 24 Complaint that [The Gap, Inc.] failed to pay all wages due, failed to pay overtime wages  
 due, failed to pay the minimum wage, failed to provide meal periods, failed to authorize  
 and permit rest breaks, failed to provide timely or accurate final paychecks, failed to

25 <sup>1</sup> Indeed, the cases are so similar that Plaintiff Collins filed a Notice of Related Case, noting the  
 26 actions "arise[] from the same or substantially identical transactions, incident, or events requiring  
 27 the determination of the same or substantially identical questions of law or fact" and "[are] likely  
 for other reasons to require substantial duplication of judicial resources if heard by different  
 judges." Perry Decl. ¶ 4, Exh. C.

1 keep records properly concerning time worked and wages paid, failed to provide  
 2 accurate itemized wage statements, failed to reimburse necessary business expenses,  
 3 and/or engaged in unfair business practices, and for penalties under the Private Attorney  
 General Act of 2004 at any time on or before the date of Preliminary Approval.

4 Perry Decl., Exh. D.

5 Accordingly, the *Harmon* Settlement, once finally approved, will decide all of the issues,  
 6 and have a preclusive effect on, the California putative collective action members' claims in this  
 7 subsequently-filed proceeding and the *Collins* Action. Indeed, Plaintiff Ino is a class member in  
 8 both the *Harmon* and *Collins* Actions. *Id.* at ¶¶ 2, 3. Thus, once the *Harmon* Settlement is finally  
 9 approved, Plaintiff will be precluded from bringing any claims, including any federal claims,  
 10 against The Gap, Inc. unless she affirmatively requests exclusion in accordance with the  
 11 procedure set forth in the *Harmon* settlement agreement. *See* Perry Decl., Exhs. D, E.

12 **B. The Duplicative Ino Federal Court Action.**

13 Apparently disappointed that their *Collins* Action was mooted by the *Harmon* Settlement,  
 14 Plaintiff's counsel now attempts to bring the same case again, this time in a different forum, and  
 15 now on behalf of a nationwide class.<sup>2</sup> Plaintiff Ino seeks to bring a collective action against The  
 16 Gap, Inc. on behalf of "All current and former hourly-paid or non-exempt store-level employees  
 17 employed by any of the Defendants at any time during the period from January 17, 2011 to final  
 18 judgment (the 'Nationwide Collective Class')." FAC ¶ 11. The *Ino* Action involves substantially  
 19 the same parties as the *Harmon* and *Collins* Actions, seeks recovery on behalf of the class pled in  
 20 the *Harmon* and *Collins* Actions against the same defendant, and involves similar allegations and  
 21 factual issues.<sup>3</sup> Both the state and federal cases involve claims of unpaid overtime and minimum  
 22

23 <sup>2</sup> Counsel in the *Collins* Action, Edwin Aiwazian of Lawyers for Justice and Kevin Shenkman of  
 24 Shenkman and Hughes, are apparently teaming up to file these parallel federal actions, in addition  
 25 to simultaneously pursuing state actions. Mr. Shenkman filed the instant *Ino* Action on behalf of  
 26 Gap brand employees, while Mr. Aiwazian used Mr. Shenkman's *Ino* Complaint to file a virtually  
 identical action in this court against another Gap-related entity, Banana Republic, LLC (*Perez v.*  
*Banana Republic, LLC*), against whom he is also currently pursuing a state court action involving  
 the same issues. Perry Decl. ¶ 8, Exhs. F, G.

27 <sup>3</sup> Plaintiff Harmon filed a Notice of Related Case regarding the present action in the *Harmon*  
 28 court, noting that the cases "arise[] from the same or substantially identical transactions" and

1 wage compensation. And both the state and federal cases seek to represent a class of current and  
 2 former non-exempt employees working in Gap stores in California; the *Ino* Action also seeks to  
 3 represent current and former non-exempt employees working in Gap stores outside of California.

### 4 III. ARGUMENT

#### 5 A. The Court Should Dismiss Plaintiff's Claims for Failure to State a Claim Under FRCP 12(b)(6).

6 A motion to dismiss under Rule 12(b)(6) “tests the legal sufficiency of a claim.” *Navarro*  
 7 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal for failure to state a claim is appropriate  
 8 where it appears beyond doubt that a plaintiff can prove no set of facts to support her claim for  
 9 relief. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). A  
 10 motion to dismiss should be granted if the plaintiff fails to proffer “enough facts to state a claim  
 11 to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570.

12 *Twombly* and *Iqbal* set forth a two-step process for analyzing the sufficiency of a  
 13 complaint when challenged via a motion to dismiss. First, the Court must accept as true all  
 14 factual allegations, but exclude/ignore any “conclusory statements” or “threadbare recitals of the  
 15 elements.” *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 555) (“we ‘are not bound to  
 16 accept as true a legal conclusion couched as a factual allegation’”). “[P]leadings that [] are no  
 17 more than conclusions, are not entitled to the assumption of truth.” *Id.* at 1950.

18 Second, the Court must determine whether the complaint on its face states a plausible  
 19 claim for relief. *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). “The plausibility  
 20 standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility  
 21 that a defendant has acted unlawfully.” *Id.* Where a complaint pleads facts that are “merely  
 22 consistent with” a defendant’s liability, it “stops short of the line between possibility and  
 23 plausibility of ‘entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). Therefore,  
 24 *Twombly* made clear that it is not proper for a court to assume that a plaintiff can prove facts she  
 25 has not alleged or that the defendant has violated laws in ways not alleged. *Twombly*, 550 U.S. at

26 “[are] likely for other reasons to require substantial duplication of judicial resources if heard by  
 27 different judges.” See Perry Decl. ¶ 9, Exh. H.



563 n.8 (quoting *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983)). If a plaintiff's allegations do not bring her "claims across the line from conceivable to plausible, [her] complaint must be dismissed." *Id.* at 570.

Plaintiff fails to satisfy *Iqbal* and *Twombly*'s requirement that a complaint, on its face, state a plausible claim for relief. Accordingly, the Court should dismiss her claims.<sup>4</sup>

**1. Plaintiff's Allegations Are Insufficient Under *Iqbal* and *Twombly* Because She Has Not Stated a Plausible Claim for Relief.**

The only factual allegations Plaintiff includes in her FAC<sup>5</sup> are entirely speculative, extremely broad, and do not demonstrate any causal connection between her allegations and the supposed failure to provide Plaintiff and the putative collective action members overtime or minimum wages. Plaintiff's factual allegations are based on information and belief, and are limited to a list of "improper wage and hour policies and practices" in which Gap purportedly engaged. FAC ¶¶ 21-22. The "examples of Defendants' policies and practices" are:

- a) "Requiring Plaintiff and the Nationwide Collective Class members to wait and undergo off-the-clock bag and/or coat checks when they exit the store for any meal break and when they exit the store after the clock out at the end of their shifts;" (FAC ¶¶ 21(a), 22(a))
- b) "[R]equiring Plaintiff and the Nationwide Collective Class members to perform several tasks prior to clocking in, such as locating and opening secured lockers, putting away their personal belongings, putting on their name badges, locating, testing, sanitizing, and putting on a walkie talkie, and obtaining fitting room keys;" (FAC ¶¶ 21(b), 22(b))
- c) "Requiring at least two employees to open a store. When Plaintiff and the Nationwide Collective Class members arrive on time for their opening shifts, but the second

<sup>4</sup> Dismissal for failure to meet the *Twombly* standard is especially vital for cases, like this one, in which the threat of "sprawling, costly, and hugely time-consuming" discovery "will push cost-conscious defendants to settle even anemic cases." *Twombly*, 550 U.S. at 559, 560 n. 6; *see also In re Graphics Processing Units Antitrust Litig.*, 2007 WL 2127577, \*23 (N.D. Cal. 2007) (allowing discovery prior to determining sufficiency of allegations in cases involving burdensome discovery would "defeat one of the rationales of *Twombly*.").

<sup>5</sup> Plaintiff pleads only the first four allegations to support for first cause of action for Violation of Fair Labor Standards Act, 29 U.S.C. § 207 (Unpaid Overtime). FAC ¶¶ 21(a)-(d). She pleads all six to support her second cause of action for Violation of Fair Labor Standards Act, 29 U.S.C. § 206 (Unpaid Minimum Wages). FAC ¶¶ 22(a)-(f).

employee has not yet arrived, Plaintiff and the Nationwide Collective Class have to wait outside the store off-the-clock until that second employee arrives;" (FAC ¶¶ 21(c), 22(c))

- d) "Requiring all employees to complete any assignment that services customers and achieves efficient store operation even when those employees are clocked out, including, for example, requiring and/or pressuring Plaintiff and the Nationwide Collective Class members to treat customers and related job duties as their top priority, and to service customers before [hey] clock in for their shifts, while they are clocked out for their meal breaks, and after they have clocked out at the end of their shifts;" (FAC ¶¶ 21(d), 22(d))
- e) "Requiring Plaintiff and the Nationwide Collective Class members to retrieve and review their schedules on their personal smart phones or personal computers if they are not in the store when the schedule is posted;" (FAC ¶ 22(e)) and
- f) "Requiring Plaintiff and the Nationwide Collective Class members to be scheduled on-call. When Plaintiff and the Nationwide Collective Class members were and/or scheduled on-call, they must call the store two hours prior to the start of the potential shift to determine if they are needed for the shift." (FAC ¶ 22 (f)).

Nowhere, however, does Plaintiff allege that she or the putative class actually complied with these purported requirements and/or actually performed any of these activities. She does not allege, for example, that she (or the collective action members) ever brought a bag to work and had to undergo a bag check; brought personal belongings to work, had to locate a locker, and then place those belongings in the locker; wore a name badge; used a walkie talkie; needed a fitting room key; worked an opening shift; had to wait for a second employee to arrive after the shift had already begun when working an opening shift; serviced customers while not being clocked in; reviewed a schedule on a phone or computer; and/or was scheduled for an on-call shift.

Rather than notifying Gap of how it allegedly violated Sections 206 and 207 of the FLSA – or that any violations of Sections 206 and/or 207 actually occurred – these allegations merely put Gap on notice that certain alleged wage and hour practices may have resulted in violations of law. Simply alleging that Gap "engaged" in certain "policies and practices" is insufficient under *Iqbal* and *Twombly*. FAC ¶¶ 21, 22; see e.g. *Jones v. Casey's Gen. Stores*, 538 F. Supp. 2d 1094, 1102-03 (S.D. Iowa 2008) (holding the following allegations insufficient: "Through its actions, policies and practices, Defendant violated the FLSA minimum wage and overtime pay

1 requirements by regularly and repeatedly failing to compensate Plaintiffs and similarly situated  
2 individuals for all hours actually worked.”).

3 Even if Gap did “engage” in the alleged unspecified “policies and practices,” this fact  
4 would merely be consistent with a failure to provide overtime or minimum wages – but, without  
5 additional facts, these allegations do not make it “plausible” that Gap actually failed to provide  
6 overtime or minimum wages. *Iqbal*, 129 S.Ct. at 1949 (*quoting Twombly*, 550 U.S. at 557)  
7 (merely pleading facts consistent with defendants’ liability stops short of plausibility). The fact  
8 that an employer has a policy requiring a bag check, or requiring any personal items be in a  
9 locker, or that an employee obtain a schedule to show up to work, does not, on its own, entitle an  
10 employee to overtime. Rather, Plaintiff must allege that she and the putative collective action  
11 members actually performed these duties, allege the approximate hours worked for which wages  
12 were not received, indicate the applicable rate of pay, and allege the amount of overtime or  
13 minimum wages due. *See Harding v. Time Warner, Inc.*, 2009 U.S. Dist. LEXIS 72851, \*9 (S.D.  
14 Cal. 2009) (“[W]here the plaintiff alleges violations of the FLSA’s minimum wage provision, the  
15 complaint should, at least approximately, allege the hours worked for which these wages were not  
16 received.” (*quoting Jones*, 538 F. Supp. 2d at 1102)). Here, not only does Plaintiff fail to allege  
17 that she actually performed any of the activities listed in the FAC, she also fails to provide any  
18 specific information regarding how many hours she actually worked; whether she recorded or  
19 reported any of the time she spent actually performing any of the above activities; or whether she  
20 was paid for some or none of the time she spent actually performing any of the above activities.

21 Legal conclusions with limited factual allegations like these do not demonstrate a  
22 “plausible” claim. *Gutierrez v. Aaron’s Inc.*, 2010 U.S. Dist. LEXIS 126828, \*8-9 (E.D. Cal.  
23 2010) (“With only a legal conclusion and limited factual allegations supporting the claim,  
24 Plaintiff has merely alleged a suspicion of a right to relief. He has not nudged his claim across  
25 the line from conceivable to plausible.”); *see also Anderson v. Blockbuster, Inc.*, 2010 U.S. Dist.  
26 LEXIS 53854, \*3 (E.D. Cal. 2010) (“These conclusory allegations do not meet minimum  
27 pleading requirements. Plaintiff fails to state when or how defendant failed to pay the required



1 wages. Without more, such legal conclusions do not suffice.”); *Deleon v. Warner Cable LLC*,  
 2 2009 U.S. Dist. LEXIS 74345 (C.D. Cal. 2009).

3 Indeed, courts have dismissed complaints including far more robust allegations than those  
 4 alleged here. For example, in *Pryor v. Aerotek Scientific, LLC*, 2011 U.S. Dist. LEXIS 155080  
 5 (C.D. Cal. 2011), the plaintiff brought a class action against her employer for failure to pay  
 6 overtime wages, among other claims, alleging that her employer had a written policy that required  
 7 employees to report to work “at least 10 minutes and as much as 20 minutes prior to their official  
 8 start times in order to perform their pre-shift work activities.” *Id.* at \*5-6. She alleged that her  
 9 employer failed to pay overtime compensation due to employees for their pre-shift activities, that  
 10 the pre-shift activities were done before the regular 8 hour shift, and that employees “were only  
 11 being paid for the time from the official start time onwards, but not from the time employees  
 12 actually started working in accordance with [the employer’s] instructions.” *Id.* at \*5-7, n. 20.  
 13 Plaintiff attached the relevant employer policies to her amended complaint. *Id.* at \*7.

14 The *Pryor* court dismissed the complaint because “[s]uch conclusory allegations are  
 15 insufficient to satisfy the pleading standard established in *Twombly* and *Iqbal*.” *Id.* at \*7 n. 20.  
 16 Although the complaint alleged that the employer required employees to arrive early and  
 17 employees were not compensated for pre-shift time, the complaint failed to include “any  
 18 allegation that [plaintiff] in fact arrived ten to twenty minutes before her shift to perform pre-shift  
 19 duties” and thus her complaint only contained “the type of ‘threadbare recitals of a cause of  
 20 action’s elements, supported by mere conclusory statements’ that *Iqbal* rejected.” *Id.* at \*6, 9  
 21 (“complaint shows that it implies, but does not specifically plead, key factual allegations”).

22 Likewise, in dismissing the plaintiff’s class action complaint in *Ovieda v. Sodexo*  
 23 *Operations, LLC*, 2012 U.S. Dist. LEXIS 173844 (C.D. Cal. 2012), the court held the following  
 24 allegations were too “bare-bones” and “devoid of sufficient factual enhancement” to allow the  
 25 court “to draw the reasonable inference that Defendant is liable for the misconduct alleged”: (i)  
 26 plaintiff was not provided timely meal and rest periods because she had a “heavy work load” and  
 27 feared reprimand, (ii) she was not allowed to leave the work area during her 30-minute lunch

1 break unless she told supervisors exactly where she was going and when she would return, and  
 2 (iii) she worked off-the-clock to finish her duties to avoid performance warnings since overtime  
 3 was discouraged by management.” *Ovieda*, 2012 U.S. Dist. LEXIS 173844 at \*8-9. The court  
 4 also noted the complaint failed to plead, among other things, “any factual detail to show what  
 5 policies and practices Defendants used to manage employees with [plaintiff’s] job duties (and  
 6 whether those policies and practices were company-wide or unique to Plaintiff’s job site).” *Id.* at  
 7 \*10; *see also Anderson*, 2010 U.S. Dist. LEXIS 53854 at \*3 (allegations that plaintiff and class  
 8 “consistently worked in excess of eight hours a day, in excess of 12 hours in a day and/or in  
 9 excess of 40 hours in a week” and defendants “willfully failed to pay all overtime” insufficient).

10 The allegations in *Pryor*, *Ovieda*, and *Anderson* are more comprehensive than Plaintiff’s,  
 11 yet were nonetheless dismissed for failure to state a plausible claim. As in *Pryor*, instead of  
 12 “specifically alleging that she worked [] hours for which she was not compensated, [Plaintiff]  
 13 asks the court to *infer* from the general allegations found in the first amended complaint that she  
 14 complied with [Gap’s alleged] policy.” *Pryor*, 2011 U.S. Dist. LEXIS 155080 at \*12. But  
 15 pursuant to *Twombly* and *Iqbal*, “the court is not at liberty to do so.” *Id.* at \*12. As Plaintiff’s  
 16 allegations do not state a plausible claim for relief, her FAC must be dismissed.

## 17 **2. Any Time Spent on the Alleged Activities is Not Compensable under** 18 **the FLSA.**

19 Even assuming Plaintiff’s conclusory allegations are true, any time spent on the alleged  
 20 activities is not compensable time under the FLSA. The FLSA, as amended by the Portal-to-  
 21 Portal Act of 1947, generally precludes compensation for activities that are “preliminary” or  
 22 “postliminary” to an employee’s “principal activities.” 29 U.S.C. § 254(a). It is only when  
 23 preliminary and postliminary activities are “integral and indispensable” to an employee’s  
 24 principal activities that they become compensable. *Steiner v. Mitchell*, 350 U.S. 247 (1956). To  
 25 be “integral and indispensable,” an activity must be (1) “necessary to the principal work  
 26 performed” and (2) “done for the benefit of the employer.” *Alvarez v. IBP, Inc.*, 339 F.3d 894,  
 27 902-03 (9th Cir. 2003), *aff’d on other grounds*, 546 U.S. 21 (2005); 29 C.F.R. § 790.7(g)

(activities like “checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks” not compensable under the FLSA if “performed under the conditions normally present.”). And just because an activity may be necessary does not mean that it is integral or indispensable. “[T]he fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are ‘integral and indispensable’ to a ‘principal activity.’” *IBP, Inc. v. Alvarez*, 546 U.S. 21, 40-41 (2005) (internal citations omitted).

Plaintiff bases her FAC on activities that fall squarely outside the definition of “integral and indispensable” and are thus non-compensable. Because time spent on these activities is non-compensable, the time cannot form the basis for Plaintiff’s unpaid overtime and minimum wage claims and thus her FAC must be dismissed for failure to state a claim.

**i. Time Spent Locating and Opening Secured Lockers and Putting Away Personal Belongings is Not Compensable.**

Plaintiff has alleged no facts, nor could she, that Gap requires its employees bring their personal belongings to work to store in a locker. The act of using a locker is not necessary, or even related, to the principal work performed, nor is it done for the benefit of the employer. Instead, it is clearly a personal choice to bring one’s personal belongings into the worksite and it is only to the benefit and for the convenience of the employee that Gap provides secure storage for such personal belongings. *See e.g.* 29 C.F.R. 790.8(c) (“if [the activity] is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a ‘preliminary’ or ‘postliminary’ activity rather than a principal part of the activity.”); *Jerzak v. City of South Bend*, 996 F. Supp. 840, 848 (N.D. Ind. 1988) (“Activities are classified as preliminary or postliminary only if they are ‘undertaken for [the employees’] own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer.”) (*quoting Dunlop v. City Elec., Inc.*, 527 F.2d 394, 398 (5th Cir. 1976); *Lindow v. United States*, 738 F.2d 1057, 1061 (9th Cir. 1984) (pre-shift work preliminary

1 because done for employee's own convenience). Accordingly, this allegation cannot serve as the  
2 basis for Plaintiff's unpaid overtime and minimum wage claims.

3 **ii. Time Spent Retrieving and Reviewing Schedules is Not**  
4 **Compensable.**

5 The time an employee spends retrieving and reviewing his or her schedule is also not  
6 compensable time. Retrieving and reviewing a schedule is not "integral and indispensable" to an  
7 employee's principal work duties: selling Gap merchandise. The schedule merely tells the  
8 employee when to show up to work; it has nothing to do with the job duties themselves.  
9 Although reviewing a schedule may be arguably necessary, the analysis is not whether a certain  
10 activity is necessary or required, but rather, whether it is integral to the principal job duties that  
11 the employee is employed to perform. *IBP, Inc.*, 546 U.S. at 40 ("fact that certain preshift  
12 activities are necessary for employees to engage in their principal activities does not mean that  
13 those preshift activities are integral and indispensable to a principal activity."). In *IBP, Inc.*, for  
14 example, the Supreme Court held that "time spent waiting to don" protective clothing before a  
15 shift "comfortably qualif[ied]" as non-compensable, even though employees necessarily had to do  
16 so to perform their jobs. *Id.* at 40-41. Thus, Plaintiff's allegation that she and the collective  
17 action members should be compensated for retrieving and reviewing schedules cannot serve as  
18 the basis for her unpaid minimum wage claim.

19 **iii. On-Call Time is Not Compensable Where, As Here, Employees**  
20 **are Able to Use the On-Call Time For Their Own Purposes.**

21 Plaintiff alleges that time spent on-call is compensable because employees are required to  
22 call the store two hours prior to the start of their potential shift to determine if they are needed,  
23 and could not accept other employment. FAC ¶ 22(f). But this does not make such time  
24 compensable under the FLSA. 29 C.F.R. § 785.17 ("An employee who is required to remain on  
25 call on the employer's premises or so close thereto that he cannot use the time effectively for his  
26 own purposes is working while 'on call'. An employee who is not required to remain on the  
27 employer's premises but is merely required to leave word at his home or with company officials  
28 where he may be reached is not working while on call."); 29 C.F.R. § 785.16 ("Periods during

1 which an employee is completely relieved from duty and which are long enough to enable him to  
2 use the time effectively for his own purposes are not hours worked.”).

3 Plaintiff does not allege that she and the other putative collective action members were  
4 required to remain on Gap’s premises or so close thereto that they were unable to use the time  
5 effectively for their own purposes. In fact, her allegations admit the opposite is true – employees  
6 could be two hours away when they called to determine if they would need to work, and would be  
7 advised *two hours in advance* that they were free to use the on-call time for other purposes. The  
8 Department of Labor recently found that a more restrictive on-call requirement did not result in  
9 compensable time. See U.S. Dept. of Labor WHD Opinion Letter, FLSA2009-17 (Jan. 16, 2009).  
10 There, on-call employees were expected to respond within 45-60 minutes of receiving an  
11 emergency call, and the travel time to a required location was approximately 5-20 minutes. *Id.*  
12 Noting that “[w]hether on-call time constitutes hours worked depends upon the employee’s  
13 ability to use the on-call time for his or her own purposes,” the DOL found that these  
14 requirements were “not so restrictive as to constitute hours worked,” and therefore the employer  
15 did “not need to compensate employees while on call.” *Id.* This time is thus not compensable  
16 under the FLSA and cannot serve as the basis for Plaintiff’s unpaid minimum wage claim.

17 **iv. Plaintiff Fails to Demonstrate that Undergoing a Bag Check is a**  
18 **Compensable, Integral and Indispensable Activity.**

19 Plaintiff alleges that Gap had policies and practices requiring putative collective action  
20 members “to wait and undergo off-the-clock bag and/or coat checks when they exit the store for  
21 any meal break and when they exit the store after the clock out at the end of their shifts.” FAC ¶¶  
22 21(a), 22(a). She does not, however, plead any facts suggesting that submitting to these checks  
23 was either necessary to the work performed or done for Gap’s benefit – factors she is must show  
24 to demonstrate that this activity was “integral and indispensable” and thus compensable. “The  
25 Ninth Circuit defines ‘integral and indispensable’ to mean ‘necessary to the principal work  
26 performed and done for the benefit of the employer.’” *Ceja-Corona v. CVS Pharm., Inc.*, 2013  
27 U.S. Dist. LEXIS 90805 (E.D. Cal. 2013) (*quoting Bamonte v. City of Mesa*, 598 F.3d 1217, 1225



(9th Cir. 2010)) (dismissing bag check claim because plaintiff failed to plead that employer benefited from security checks). Because Plaintiff fails to allege that submitting to bag checks was an integral and indispensable activity for which she should be compensated, this claim must be dismissed.

Further, even had Plaintiff adequately pled this claim, it must still be dismissed. The great weight of federal authority holds that time spent in a security screening or bag check is not compensable time. *See e.g. Gorman v. Consol. Edison Corp.*, 488 F.3d 586 (2d Cir. 2007) *cert. denied*, 553 U.S. 1093 (2008) (power plant); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344-45 (11<sup>th</sup> Cir. 2007) *cert. denied*, 552 U.S. 1077 (2007) (airport); *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 364 n.5 (3d Cir. 2007); *Ceja-Corona*, 2013 U.S. Dist. LEXIS 90805 (distribution center); *Anderson v. Purdue Farms, Inc.*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009) (food-processing plant); and *Sleiman v. DHL Express*, 2009 U.S. Dist. LEXIS 35812, \*7-12 (E.D. Pa. 2009) (mail-sorting center). The Supreme Court recently accepted this issue for review. *Integrity Staffing Solutions, Inc. v. Busk*, 2014 U.S. LEXIS 1724 (U.S. Mar. 3, 2014). Consequently, time spent waiting for and undergoing a bag or coat check is not compensable time and therefore cannot serve as the basis for her unpaid overtime and minimum wage claims.

### **3. Alternatively, the Court Should Require a More Definite Statement.**

Under Rule 12(e), the Court has broad discretion to order Plaintiff to provide a more definite statement where the complaint is “so vague or ambiguous” that Gap “cannot reasonably prepare a response.” Fed. R. Civ. P. 12(e). An order for a more definite statement serves the Court’s and the parties’ interests because “[u]nless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court’s docket becomes unmanageable, the litigants suffer, and society loses confidence in the court’s ability to administer justice.” *Anderson v. Dist. Bd.*, 77 F.3d 364, 367 (11th Cir. 1996) (holding trial court should have instructed plaintiff’s counsel to provide more definite statement). Should this Court determine that a motion to dismiss is not warranted, it should order a more definite statement from Plaintiff to address the above issues.

**B. The Colorado River Doctrine Compels Dismissal or a Stay of This Action As to Plaintiff Ino and California-based Employees: Plaintiff Has No Basis for Proceeding with Virtually Identical Class Claims in Federal Court.**

Should the Court not dismiss Plaintiff's FAC for failure to state a claim under Rule 12(b)(6), Gap requests that the Court dismiss or stay this action as to Plaintiff Ino and the California-based employees pursuant to the *Colorado River* doctrine. Under the *Colorado River* doctrine, a federal court may dismiss a federal action to avoid duplicative litigation where a parallel action is pending in state court. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (federal courts are empowered to dismiss a federal action "in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts."). The doctrine "rest[s] on considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" *Id.*, quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952); see also *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983). Dismissal is appropriate under *Colorado River* where (i) a "parallel" state court proceeding is pending, and (ii) the balance of non-exclusive factors weigh in favor of abstention. *Nakash v. Marciano*, 882 F.2d 1411 (9th Cir. 1989).

The California employees' claims should be dismissed pursuant to *Colorado River* because the *Ino* Action, at least with regard to the California-based employees' claims, bears all the hallmarks of the "vexatious" and "reactive nature" that courts should consider in deciding whether to defer to a parallel state litigation. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 17 n.20. It is without doubt that Plaintiff – or rather, her counsel – brought this redundant action because they are precluded from further litigating the *Collins* Action, as the claims in *Collins* are subject to dismissal due to the *Harmon* Settlement.

**2. The State Court Actions and This Action are "Parallel Proceedings."**

The *Colorado River* doctrine does not require that the two actions be identical or exactly parallel; rather, "[i]t is enough if the two proceedings are 'substantially similar.'" *Nakash*, 882 F.3d at 1416 ("exact parallelism...is not required."). "The mere presence of additional parties or

1 issues in one of the cases will not necessarily preclude a finding that they are parallel.” *Gintz v.*  
 2 *Jack in the Box, Inc.*, 2006 U.S. Dist. LEXIS 88987, \*8-9 (N.D. Cal. 2006).

3 Indeed, even the fact that two proceedings cover different claims and different class  
 4 periods, and involve different representative plaintiffs and different class members does not  
 5 preclude a finding that the cases are substantially similar. *See e.g. Gintz*, 2006 U.S. Dist. LEXIS  
 6 88987 at \*11-12 (substantially similarity even though federal action cited violations of statutes  
 7 not included in the state action because “both actions allege the same factual conditions and all of  
 8 the claims involve the central factual issue of whether or not JIB denied meal and rest period  
 9 breaks to non-exempt night shift workers, resulting in damages for work that was performed ‘off  
 10 the clock.’”); *Koval v. Pacific Bell Telephone Company*, 2012 U.S. Dist. LEXIS 113196, \*10  
 11 (N.D. Cal. 2012) (FLSA collective action substantially similar to state case because “crux” of  
 12 both was “whether or not Pacific Bell denied meal and rest period breaks to field personnel within  
 13 California, resulting in damages of payment for work performed during those periods.”).

14 Here, the state court *Harmon* and *Collins* actions and the *Ino* Action are “substantially  
 15 similar.” Both the state and federal actions seek recovery on behalf of the class pled in the state  
 16 actions against the same defendant (The Gap, Inc.) and involve similar allegations and factual  
 17 issues. Both the state and federal actions seek to represent a class of current and former non-  
 18 exempt employees working in Gap stores. Ino is a putative class member of both the *Harmon*  
 19 and *Collins* Actions, and both the state and federal actions were brought on behalf of individuals  
 20 employed by The Gap, Inc. who were allegedly not provided proper overtime and minimum  
 21 wages. Because the parties’ interests in the disputes are virtually identical, the plaintiffs in both  
 22 actions are considered “substantially the same for purposes of *Colorado River*.” *See Clark v.*  
 23 *Lacy*, 376 F.3d 682, 686 (7th Cir. 2004) (quotations omitted) (federal and state derivative  
 24 plaintiffs substantially same parties because “formal symmetry” between the two actions not  
 25 required); *Teamsters Local No. 175 & 505 Pension Trust Fund v. IBP, Inc.*, 123 F. Supp. 2d 514,  
 26 517 (D.S.D. 2000) (federal and state suits parallel under *Colorado River* where federal plaintiff



1 appeared to be a class member in the state proceeding even though not a named plaintiff in state  
2 suit and class had not yet been certified).

3 Further, Plaintiff's counsel is the same in the *Ino* and *Collins* Actions, the class definitions  
4 are nearly identical, and the class periods for the state action and the present action overlap  
5 substantially. *See e.g. Koval*, 2012 U.S. Dist. LEXIS 113196 at \*10 (substantial similarity where,  
6 among other things, same parties and attorneys appeared in both actions, class definitions were  
7 virtually identical, and class periods overlapped). Indeed, the claims in the state actions and the  
8 present action are so similar that, once the *Harmon* Settlement is granted final approval, that  
9 settlement will trigger *res judicata* preclusion over the claims raised in the *Ino* and *Collins*  
10 Actions for the California members of the *Ino* putative class.<sup>6</sup>

11 What is more, both the state and federal actions involve claims of unpaid overtime and  
12 minimum wage compensation. The two claims raised in the *Ino* Action have analogous state law-  
13 based claims proceeding in the state actions; the relief sought in this actions is merely a subset of  
14 the broader array of relief sought in the state actions. "We should be particularly reluctant to find  
15 that the actions are not parallel when the federal action is but a 'spin-off' of more comprehensive  
16 state litigation." *Nakash*, 882 F.3d at 1417.

17 For all of these reasons, the *Harmon* and *Collins* state actions and the *Ino* Action are  
18 substantially similar, parallel proceedings.

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20 <sup>6</sup> The doctrine of *res judicata* applies "if (1) the decision in the prior proceeding is final and on  
21 the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and  
22 (3) the parties in the present proceeding or parties in privity with them were parties to the prior  
23 proceeding." *Villacres v. ABM Industries Inc.*, 189 Cal. App. 4th 562, 577 (2010). First, the  
24 approval of the *Harmon* settlement is a final decision, on the merits. *Id.* at 577. Second, as set  
25 forth herein, the *Harmon*, *Collins*, and *Ino* Actions are all sufficiently similar. *See id.* at 583-84  
26 ("If the matter raised in the subsequent suit was within the *scope* of the prior action, related to the  
27 *subject matter* and *relevant* to the issues, so that it *could* have been raised, the judgment is  
28 conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged.").  
Lastly, the class members in all three actions are in privity with one another. *See id.* at 591-92  
(unnamed class member in earlier class action, which settled and was dismissed with prejudice,  
bound by settlement and thus *res judicata* doctrine applied to preclude his later claims based on  
same set of facts); *see also Arias v. Superior Court*, 46 Cal.4th 969, 984 n. 6 (2009).

### 3. The *Colorado River* Factors Weigh in Favor of Dismissal or a Stay.

Once the Court determines that the proceedings are parallel, it engages in a multi-factor balancing test, where no single factor is determinative. *Colorado River*, 424 U.S. at 818-19 (“No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required.”). The factors are: (1) whether either court has assumed jurisdiction over property in dispute; (2) the relative convenience of the forums; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the concurrent forums obtained jurisdiction; (5) whether state or federal law provides the rule of decision on the merits; (6) whether the state proceeding is adequate to protect the parties’ rights; and (7) whether the federal plaintiff is engaged in forum shopping or seeking to avoid adverse state court rulings. *Koval*, 2012 U.S. Dist. LEXIS 113196 at \*8-9. These factors “are to be applied in a pragmatic and flexible way, as part of a balancing process” to determine whether a stay of the federal proceedings would further the underlying purpose of judicial economy. *Nakash*, 882 F.2d at 1415.

As neither the state actions nor this federal action involve a *res*, the first factor is not pertinent. Similarly, as both forums are equally convenient, the second factor is also irrelevant. *Gintz*, 2006 U.S. Dist. LEXIS 88987 at \*13 (“when there is no *res* in the control of either court and the forums are equally convenient those factors become irrelevant to the analysis.”); *Nakash*, 882 F.2d at 1415 n.6. The remaining factors all support dismissal of the California putative class.

#### i. Avoiding Piecemeal Litigation: Litigating the *Ino* Action While the State Actions Proceed Would Undeniably Result in Piecemeal Litigation and Waste Judicial Resources.

Simultaneously litigating this case and the state actions is inefficient and a waste of judicial resources. Allowing the *Ino* Action to continue would clearly result in piecemeal litigation. *American Int’l Underwriters v. The Continental Ins. Co.*, 843 F.2d 1253, 1258 (9th Cir. 1988) (“Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results.”).

1 State and federal courts have concurrent jurisdiction over FLSA claims. *See* 29 U.S.C. §  
 2 216(b) (actions for violations of §§ 206 and 207 may be brought in state or federal court); *see*  
 3 *also Gintz*, 2006 U.S. Dist. LEXIS 88987 at \*14. With regard to the California-based employees,  
 4 this concurrent state and federal jurisdiction over Plaintiff's claims will result in piecemeal  
 5 litigation. If the California-based employees' claims are litigated in both this Court and the state  
 6 courts simultaneously, there is likely to be substantial duplication and inconsistent rulings.

7 Moreover, once the *Harmon* Settlement is granted final approval, the *Ino* Action will be  
 8 barred, to some degree, by *res judicata* and/or collateral estoppel. *See* n. 6. This factor therefore  
 9 weighs in favor of dismissal. *See e.g. Tackitt v. Superior Court*, 2013 U.S. Dist. LEXIS 160507,  
 10 \* 13 (E.D. Cal. 2013) (*res judicata*/claim preclusion effect "weighs in favor of a stay or dismissal,  
 11 considering one of the court's resources will be 'wasted' in the sense that the action that reaches  
 12 judgment on the merits first will foreclose further prosecution of the other action."). Accordingly,  
 13 this factor "strongly favors" a dismissal or stay. *Koval*, 2012 U.S. Dist. LEXIS 113196 at 13.

14 **ii. Order in Which the Concurrent Forums Obtained**  
 15 **Jurisdiction: The State Actions Have Progressed Much**  
 16 **Farther Than the *Ino* Action.**

17 In evaluating this factor, the Court should look to "how much progress has been made in  
 18 the two actions." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 21. At this point, the *Harmon*  
 19 Action has progressed far beyond this case. Indeed, the *Harmon* Action was litigated for over 18  
 20 months, and preliminary approval has been granted to parties' settlement. *Nakash*, 882 F.2d at 12  
 21 (because state court action had progressed "far beyond" federal action, "it would be highly  
 22 inefficient to allow the federal litigation to proceed"). The state court in the *Harmon* Action has  
 23 invested substantial time and resources in the action. The parties appeared for multiple status  
 24 conferences in the *Harmon* Action, and pursuant to the Court-ordered briefing schedule, Harmon  
 25 filed her motion for class certification on August 30, 2013 and Gap opposed the motion on  
 26 September 27, 2013. The parties thereafter agreed to mediate the case. Following mediation, the  
 27 parties settled the case and the court granted preliminary approval of the class action settlement  
 28 on March 24, 2014. In the *Collins* Action, Plaintiff Collins has filed five motions to compel, Gap

1 has responded to each, and the hearings on these motions are currently scheduled for March 24,  
 2 2014. In contrast, thus far, this case is at the pleadings stage and has been pending less than two  
 3 months. Accordingly, this factor favors dismissal or a stay. *See Nakash*, 882 F.2d at 1415.

4 **iii. Whether State or Federal Law Provides the Rule of Decision**  
 5 **on the Merits: The State and Federal Courts Have**  
 6 **Concurrent Jurisdiction.**

7 Plaintiff raises FLSA claims and therefore federal law provides the rule of decision on the  
 8 merits. However, while “the presence of federal-law issues must always be a major consideration  
 9 weighing against surrender” of federal court jurisdiction, “[i]f the state and federal courts have  
 10 concurrent jurisdiction over a claim, this factor becomes less significant.” *Nakash*, 882 F.3d at  
 11 1416; *Koval*, 2012 U.S. Dist. LEXIS 113196 at \*14. With regard to those putative collective  
 12 action members in California, the resolution of the state law issues (the *Harmon* Settlement) will  
 13 eliminate their federal claims in this case. Thus, this factor weighs in favor of dismissal or stay.

14 **iv. Whether the State Proceeding is Adequate to Protect the**  
 15 **Parties’ Rights: The State Court Proceedings are Adequate**  
 16 **and Did Properly Adjudicate Plaintiff’s Claims.**

17 The state forum will adequately protect Plaintiff Ino’s rights, as she is a putative class  
 18 member in the *Harmon* and *Collins* Actions. Plaintiff Ino asserts the same claims against the  
 19 same defendant as the state actions. Thus, the interests in the *Ino* Action will be, and have been,  
 20 addressed in the more comprehensive *Harmon* Action. *See Nakash*, 882 F.3d at 1417. Any  
 21 argument that putative collective action members would benefit from participating in this new,  
 22 copy-cat action with fewer claims for relief (and thus fewer chances for recovery) and  
 23 encompassing a more narrow class period (January 17, 2011 rather than April 24, 2008 in  
 24 *Harmon*) would be flawed.

25 In any event, courts have rejected this very idea that a federal “spin-off” of a more  
 26 comprehensive state court proceeding should be permitted to continue. *See e.g. Silvaco Data*  
 27 *Systems, Inc. v. Technology Modeling Associates, Inc.*, 896 F. Supp. 973, 978 (N.D. Cal. 1995)  
 28 (“It makes no sense to try and carve out one aspect of [the parties’] dispute and try it separately,

1 particularly since it is intertwined with the issues involved in the other aspects of their ongoing  
 2 [state court] war.”). Consequently, this factor weighs in favor of dismissal or a stay.

3 **v. Whether the Federal Plaintiff is Engaged in Forum Shopping**  
 4 **or Seeking to Avoid Adverse State Court Rulings: Plaintiff is**  
 5 **Both Engaging in Forum Shopping and Attempting to Avoid**  
 6 **the *Harmon* Settlement.**

7 The *Ino* Action is a classic example of forum shopping. Now that the *Harmon* Settlement  
 8 precludes Plaintiff counsel’s *Collins* Action, they have decided to seek out a new forum for their  
 9 claims. This attempt to forum shop and avoid the *Harmon* Settlement weighs “strongly in favor”  
 10 of abstention. *Nakash*, 882 F.3d at 1417 (“Apparently, after three and one-half years, Nakash has  
 11 become dissatisfied with the state court and now seeks a new forum for their claims. We have no  
 12 interest in encouraging this practice.”); *see also Fireman’s Fund Ins. Co. v. Quackenbush*, 87  
 13 F.3d 290, 297 (9th Cir. 1996) (“The multiple and over-lapping assertions of these challenges in  
 14 state court, before the Commissioner, and in this court causes this court to question [the insurer’s]  
 15 tactics.”); *Koval*, 2012 U.S. Dist. LEXIS 113196 at \*16-17 (“[A]llowing a substantially similar  
 16 federal action to proceed would likely encourage forum shopping.”).

17 **C. The Court Should Dismiss This Action as to Plaintiff Ino and the California-**  
 18 **based Employees Under its Inherent Authority to Avoid Duplicative**  
 19 **Litigation.**

20 In addition to properly dismissing this action under *Colorado River*, with regard to the  
 21 California-based employees, the Court can and should defer to the *Harmon* Action pursuant to the  
 22 Court’s inherent authority to control its docket by dismissing duplicative actions. “A court may  
 23 choose not to exercise its jurisdiction when another court having jurisdiction over the same matter  
 24 has entertained it and can achieve the same result.” *Crawford v. Griffin Bell*, 599 F.2d 890, 893  
 25 (9th Cir. 1979) (“increasing calendar congestion in the federal courts makes it imperative to avoid  
 26 concurrent litigation in more than one forum whenever consistent with the rights of the parties.”).

27 As set forth above, the first-filed *Harmon* Action already has jurisdiction over the same  
 28 putative class of individuals in California as in the present action, and the more narrow claims



1 made and relief sought in this action are fully encompassed by the *Harmon* Action. Indeed, the  
2 *Harmon* Action is a better forum given its broader scope and additional claims.

3 Moreover, the hardship and burden to Gap of being forced to litigate the same issues on  
4 behalf of the same California putative class members is significant. Should this action move  
5 forward, Gap would be forced to undertake duplicative efforts in both cases, resulting in  
6 increased discovery costs, attorneys' fees, and other litigation expenses. Further, Gap would face  
7 the possibility of inconsistent results in the two cases. Gap should not be forced to defend  
8 multiple actions when those actions involve the same claims brought by the same plaintiff's  
9 counsel. Lastly, dismissal of this action as to the California putative class would result in the  
10 conservation of judicial resource and would be of significant convenience to this Court. For all of  
11 these reasons, the Court should dismiss this action as to the California putative class members.

12 **D. In the Alternative, the Court Should Stay This Action Pending the U.S.**  
13 **Supreme Court's Decision in *Integrity Staffing Solutions v. Busk*.**

14 Both of Plaintiff Ino's causes of action are premised, in part, on bag check allegations.  
15 FAC ¶¶ 21(a), 22(a). On March 3, 2014, the United States Supreme Court granted *certiorari* in  
16 *Integrity Staffing Solutions, Inc. v. Busk* on the following issue: Whether time spent in security  
17 screenings is compensable time under the FLSA, as amended by the Portal-to-Portal Act.  
18 *Integrity Staffing Solutions, Inc. v. Busk*, 2014 U.S. LEXIS 1724 (U.S. Mar. 3, 2014). As the  
19 outcome of that case will directly impact Plaintiff's claims, Gap requests that the Court stay this  
20 case with respect to Plaintiff's bag check allegations pending resolution of *Integrity Staffing*.

21 The Court has inherent power to stay proceedings if doing so would best serve the causes  
22 of judicial economy, minimization of legal expense, and fairness to the litigants. *Landis v. North*  
23 *American Co.*, 299 U.S. 248, 254-55 (1934) ("power to stay proceedings is incidental to the  
24 power inherent in every court to control the disposition of the causes on its docket with economy  
25 of time and effort for itself, for counsel, and for litigants"); *Leyva v. Cert. Grocers of Cal., Ltd.*,  
26 593 F.2d 857, 863 (9th Cir. 1979) (federal district court has inherent power to stay a case  
27 pursuant to its "powers to control its docket and to provide for the prompt and efficient

determination of the cases pending before it.”); *Good v. Prudential Ins. Co. of America*, 5 F. Supp. 2d 804, 806 (N.D. Cal. 1998) (power to stay proceedings within the Court’s discretion).

When analyzing whether to issue a stay, a court will look at whether (i) the moving party is likely to succeed on the merits, (ii) the moving party is likely to suffer irreparable harm in the absence of relief, (iii) the balance of equities tips in the moving party’s favor, and (iv) a stay is in the public interest. *Big Lagoon Rancheria v. California*, 2012 U.S. Dist. LEXIS 12225,\*13-14 (N.D. Cal. 2012).

Here, Gap is likely to succeed on the merits of Plaintiff’s bag check claim. *See* Section III.A.2.iv. Further, Gap is likely to suffer irreparable harm should the Court not grant a stay. Plaintiff bases both of her federal causes of action on her allegations that Gap had a policy and practice requiring putative collective action members to undergo bag and/or coat checks. FAC ¶¶ 21(a), 22(a). This is precisely the issue that the Supreme Court is currently considering – whether requiring employees to submit to security screenings qualifies as compensable time under the FLSA. Requiring that the parties litigate this issue while not knowing whether the law may drastically change will result in irreparable harm to both parties. It would waste valuable resources and drive up litigation costs. In the same vein, there would be no harm to Plaintiff and the putative collective action members were this case stayed, and the public interest considerations weigh in favor of a stay as well. Without a stay, this Court would be required to spend time and resources adjudicating this action while the law remains in flux; the parties would move forward with discovery and motion practice, incurring the costs of litigation and expending resources, and were the Supreme Court to affirm that the time spent in security screenings is not compensable under the FLSA (in line with the weight of authority on this issue), all of the time and resources spent would have been for naught. For these reasons, the Court should issue a stay.

**E. The Court Should Strike Plaintiff’s Reference to “DOE” Defendants.**

Plaintiff’s references and allegations throughout her complaint related to DOE defendants should be stricken. *See* FAC ¶¶ 8-10. A “court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). The Court has broad

discretion in deciding whether to grant a motion to strike. *Vess v. Bank of Am., N.A.*, 2012 U.S. Dist. LEXIS 4484,\*32 (S.D. Cal. 2012) (striking allegations as to Doe defendants).

As a general rule, “Doe pleading is improper in federal court.” *Buckheit v. Dennis*, 713 F. Supp. 2d 910, 918 n.4 (N.D. Cal. 2010) (*sua sponte* dismissing Doe defendants in complaint).<sup>7</sup> Indeed, “[t]here is no provision in the Federal rules permitting the use of fictitious defendants.” *Id.* Accordingly, the Court should strike all references to DOE defendants in Plaintiff’s FAC, including references to DOE defendants in the case caption, the entirety of paragraphs 8-10, and references to each cause of action being brought against “DOES 1 through 10” (FAC 9:3, 11:3).

#### IV. CONCLUSION

For these reasons, Gap requests that the Court dismiss Plaintiff’s FAC for failure to state a claim, or in the alternative, require a more definite statement. Should the Court not dismiss Plaintiff’s FAC, Gap requests that the Court dismiss or stay all of Plaintiff Ino and the California-based employees’ claims under *Colorado River* or under the Court’s inherent authority to avoid duplicative litigation. Alternatively, Gap requests that the Court stay Plaintiff’s bag check claims pending the decision in *Integrity Staffing Solutions v. Busk*. Lastly, Gap requests that the Court strike the improperly pled DOE defendants from Plaintiff’s FAC.

Dated: March 24, 2014

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: /s/ Julia Collins Riechert

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<sup>7</sup> See also *Vess v. Bank of Am., N.A.*, 2012 U.S. Dist. LEXIS 4484 at \*32-33 (granting motion to strike allegations regarding Doe defendants as “inappropriate” because “the use of fictitious Doe defendants is not favored in federal court.”); *Martel v. Cadjew*, 2011 U.S. Dist. LEXIS 106575, \*13-14 (E.D. Cal. 2011) (granting motion to strike references to Doe defendants because “[t]he use of Doe Defendants in federal court is problematic,” “ultimately unnecessary,” and “inappropriate.”); *Graziose v. Am. Home Prod. Corp.*, 202 F.R.D. 638, 643 (D. Nev. 2001) (“If there are unknown persons or entities, whose role is known, that fact should be expressed in the complaint, but it is unnecessary and improper to include ‘Doe’ parties in the pleadings.”).